Filed 9/4/13 In re J.A. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.A., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. B.W., Defendant and Appellant.	E058470 (Super.Ct.No. J243976) OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed.

Teri A. Kanefield, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Jeffrey L. Bryson, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minor.

The juvenile court terminated the parental rights of J.E. (Mother) and defendant and appellant B.W. (Father) to their son, J.A. (Welf. & Inst. Code, § 366.26, subd. (b)(1).)[1] Father raises six issues on appeal. First, Father asserts the juvenile court violated his statutory and due process rights by not honoring his request to be transported to the termination hearing. Second, Father contends the juvenile court erred by not informing Father he could request the court find him to be a presumed father. Third, Father asserts the juvenile court, and plaintiff and respondent San Bernardino County Children and Family Services (the Department), failed to timely inform him that a test revealed he was J.A.'s biological father. Fourth, Father contends the juvenile court violated Father's opportunity to be heard when it did not respond to Father's written request for an attorney. Fifth, Father asserts the foregoing alleged errors had the cumulative effect of denying him due process. Sixth, Father asserts the juvenile court erred by not performing a proper inquiry pursuant to the Indian Child Welfare Act (ICWA). We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

J.A. is male and was born in April 2012. At the time of birth, J.A. tested positive for methamphetamines. Mother had six other children who had been removed from her care due to Mother's substance abuse. Mother's parental rights to two of her children were terminated, and Mother failed to reunify with the other four children. S.S., the

[1] All subsequent statutory references will be to the Welfare and Institutions Code, unless otherwise indicated.

father of two of Mother's other children, was named as J.A.'s father on J.A.'s birth certificate. However, on April 26, Mother said she did not know who J.A.'s father was.

On April 30, 2012, the Department filed a petition alleging Mother failed to protect J.A. by (1) abusing drugs; (2) engaging in domestic violence in the past and not addressing the violence; (3) not benefiting from prior reunification services; and (4) abandoning J.A. at the hospital. (§ 300, subd. (b).) The Department alleged Mother left J.A. without provisions for support because Mother's whereabouts were unknown. (§ 300, subd. (g).) The juvenile court ordered J.A. be detained and placed in a foster home. The court ordered that S.S. take a paternity test. The court ordered that Mother complete a paternity inquiry. The juvenile court advised Mother she might not receive reunification services. (§ 361.5, subd. (b).) The court denied Mother visitation with J.A.

In an amended petition dated April 30, 2012, Father was named as an alleged father along with S.S. On May 14, S.S. told a Department social worker that he might be J.A.'s father. The Department was waiting to receive results from the paternity test. Mother told the social worker "she is not sure who the father is but she is adamant that the child's father is not [S.S.]" Mother completed a "Parental Notification of Indian Status" form. The form reflected Mother did not have Indian ancestry.

The DNA paternity test was completed on May 23, 2012. The test revealed a zero percent probability that S.S. was J.A.'s father. On June 20, the juvenile court was informed of the paternity test results. S.S. was excused from all further hearings. At a hearing on July 19, Father was not present in court due to being in prison; however, his

attorney was present. The hearing was continued so Father's attorney could "prepare [a] transportation order." The transportation order was prepared and signed by the juvenile court judge on July 23. On July 26, Father was served with a form entitled "Prisoner's Statement Regarding Appearance at Hearing Affecting Parental Rights." The form allowed a prisoner to inform the court of his/her desire to be present at an upcoming hearing.

Mother was arrested on June 19 for burglary. (Pen. Code, § 459.) Mother was released on June 22, but arrested again on July 31 for fighting in a public place. (Pen. Code, § 415.) Mother was released on August 1; her whereabouts were unknown following the release. Father's mother (Grandmother) contacted a Department social worker and said Father was an alcoholic. Grandmother explained Father was in prison for burglary and had approximately 18 months left to serve on his sentence.

The juvenile court held J.A.'s jurisdiction and disposition hearing on August 20, 2012. Father and his attorney were present at the hearing; Father was in custody. Father's attorney requested a paternity test to determine if Father was J.A.'s biological father. The court ordered DNA testing for Father. The court found J.A. did not come under the provisions of ICWA. The court found true the allegations that Mother failed to protect J.A. (§ 300, subd. (b)), left J.A. with no provisions for support (§ 300, subd. (g)), and failed to reunify with J.A.'s half siblings. The court ordered J.A. continue to be placed in foster care. The court denied visitation and reunification services to Mother and Father. At the hearing, the court gave notice that (1) the termination of parental rights hearing would take place on December 18, 2012, at 8:30 a.m.; and (2) a

review hearing would take place on September 28. The juvenile court said, "[Father] is ordered to return on December the 18th. This is notice to you of that hearing."

On November 6, 2012, the juvenile court judge signed an order to transport Father to the December 18 hearing. The transportation order reflected Father was to be transported from North Kern State Prison. J.A.'s DNA was collected on November 7, and Father's DNA was collected on November 27. Paternity test results were completed on December 6, 2012, and filed with the court on December 14. The test reflected a 99.99 percent probability that Father was J.A.'s biological father. On December 18, Father's attorney was present in court, but Father was not at the hearing. Father's counsel said, Father "did waive his presence for this hearing." The court continued the hearing to February 4, 2013. The court asked if notice was complete for the February 4 hearing. The Department's counsel responded, "Father was noticed in court for today."

On January 24, 2013, the Department informed the court that Father was scheduled to be released from Soledad State Prison on October 11, 2013. On January 27, Father wrote a letter to the juvenile court. In the letter, Father expressed his "wish to exercise [his] custody rights and be included in all decisions concerning [J.A.'s] welfare." Father wrote, "Recently I learned of a February 4th hearing regarding my son. I received no notice of this hearing, and was not given an opportunity to attend. Had my mother not informed me, this hearing would have occurred without my knowledge. I request that any decisions concerning the custody of my son be postponed

until I can be present. I also request legal counsel to guarantee my parental rights are honored."

A memo dated January 27 and addressed to the "OTC Desk" was also sent to the juvenile court. In that memo, Father wrote: "On 20 November 2012, I signed a waiver for my court appearance scheduled for 18 December 2012. At this time I rescind my waiver to attend that and any future court appearances. Please advise me in a timely manner should I be summoned to appear in court."

On January 29, the Department mailed Father notice of the February 4 hearing. On February 4, the juvenile court held the termination hearing. At the hearing, Father's attorney said, "[Father] is not present. He's in State prison and previously waived transport." Grandmother was present at the hearing. Father's attorney asked the juvenile court to have Grandmother assessed for a possible relative placement. Grandmother asked the juvenile court to consider Father's "pre-GED scores" as evidence that Father was "trying to better himself" while in prison. Grandmother asked that J.A. remain in temporary foster care until Father was released from prison. Grandmother explained that she could not take custody of J.A. due to an illness. The juvenile court terminated Mother's and Father's parental rights to J.A. and ordered J.A.'s permanent plan be adoption. On February 5, the day after the hearing, the juvenile court received Father's January 27 letter and memo.

DISCUSSION

A. DUE PROCESS: TRANSPORTATION

Father contends the juvenile court violated his statutory and due process rights by taking "no steps to honor his request to be transported" to the February 4 termination hearing. Father asserts his waiver to be present at the December 18 hearing was not a waiver of his presence at all future hearings. We find the alleged error to be harmless.

Penal Code section 2625, subdivision (d), provides: "Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue" a transportation order. The statute further provides that a juvenile court shall not adjudicate a petition to terminate parental rights "without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner . . . ." (Pen. Code, § 2625, subd. (d).) Due process guarantees notice and a meaningful opportunity to be heard. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 601 (*Jesusa V.*).) There is case authority for the proposition that a waiver of appearance at a specific hearing does not automatically apply to a subsequent hearing. (*In re Julian L.* (1998) 67 Cal.App.4th 204, 208.)

The record reflects Father's counsel said, at the hearing on February 4, that Father "previously waived transport." It is unclear if Father knowingly waived his right to be present at the February 4 hearing, as the record does not include a signed waiver or affidavit as required by Penal Code section 2625, subdivision (d). Given the lack of a written waiver in the record, we will assume the juvenile court erred in conducting the

termination hearing without Father being present. Accordingly, we review the record to determine if the juvenile court's error was harmless. (*Jesusa V., supra*, 32 Cal.4th at p. 625.) We must determine if it is reasonably probable a result more favorable to Father would have been reached if Father had been present at the hearing. (*Id.*; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

The issue at the termination hearing was whether J.A. was likely to be adopted. Section 366.26, subdivision (c)(1), provides: "If the court determines . . . that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." The record reflects Father never met J.A. Given that Father never met the child, it is unclear what, if any, evidence or argument Father could offer about J.A.'s adoptability or lack thereof. Since it appears Father would have nothing to offer in regard to J.A.'s adoptability, we conclude the juvenile court's error was harmless because it is not reasonably probable a result more favorable to Father would have occurred if Father had been present at the hearing.

Father asserts the juvenile court's error was structural and therefore not subject to harmless error review. In *Jesusa V.*, the child's biological father was incarcerated. (*Jesusa V., supra*, 32 Cal.4th at p. 595.) The biological father asserted he had statutory and constitutional rights to be present at the jurisdiction hearing. (*Id.* at p. 621.) Our Supreme Court analyzed Penal Code section 2625, and concluded a waiver must be executed reflecting a knowing waiver of an incarcerated parents' right to be present at a dependency hearing. (*Jesusa V.*, at pp. 622-624.) The Supreme Court determined the

juvenile court erred by conducting the jurisdiction hearing without the biological father's presence or a waiver of his presence. (*Id.* at p. 624.)

The Supreme Court then discussed a harmless error analysis. The court explained the error was not reversible per se because the juvenile court did not act in excess of its jurisdiction due to Penal Code section 2625 being designed to grant an incarcerated parent a right to attend hearings—it was not intended to be a jurisdictional statute. (*Jesusa V.*, *supra*, 32 Cal.4th at p. 624.) The Supreme Court analogized the situation to a criminal defendant being absent from trial, and noted such an error is regularly subjected to a harmless error review. (*Id.* at p. 625.) Additionally, the Supreme Court cited a legislative interest in resolving dependency proceedings expeditiously and concluded this interest "would be thwarted if the proceeding had to be redone without any showing the new proceeding would have a different outcome." (*Ibid.*) Thus, our Supreme Court held the juvenile court's error could be reviewed to determine if it were harmless. (*Ibid.*)

The Supreme Court's analysis concerning structural error appears applicable in this situation as well, in that our high court has already determined Penal Code section 2625 errors do not involve the juvenile court's jurisdiction—only a statutory violation. Father asserts the termination of parental rights is distinguishable from other types of dependency proceedings. However, Father's argument is relying on the facts of his case, not the law set forth in *Jesusa V.* For example Father "urges this court to find that structural error occurs under facts such as these: A parent's rights are terminated, the lower court makes no attempt to transport him to the hearing, does not acknowledge or

respond to his written requests, one of his letters never appears in the record, he is never given alternate means for communicating with the court, and he is not given required documentation (JV-505) which would have better enabled him to communicate with the court."[2]

Father's argument concerning the facts of this case cannot overcome the law set forth by our high court in *Jesusa V. ante*, which reflects that a violation of Penal Code section 2625 is not structural. We are bound to follow our high court's conclusion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

B. JV-505 FORM

Father contends the juvenile court erred by not presenting him with a form entitled, "Statement Regarding Parentage," which allows an alleged father to give the court information concerning his interaction with the child. For example, there is a space for an alleged father to describe the money or items he has given to a child. (JV-505.) We disagree with Father's contention.[3]

If one or more men are identified as an alleged father, then the juvenile court shall give each man a JV-505 form. (§ 316.2, subd. (b).) For the sake of judicial

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[2] There is a dispute between Father and the Department as to whether Father's January 27 letter and memo constitute the two letters referenced in the January 27 letter, or whether there was a separate, earlier, letter to the juvenile court, which does not appear in the record.

[3] The Department asserts Father forfeited this contention by not raising it at the juvenile court. Father contends he did not forfeit the issue. We choose to address the merits of Father's argument because the issue is easily resolved.

efficiency, we will assume the juvenile court erred because a JV-505 does not appear in the record. Accordingly, we must determine if the error was harmless.

We must determine if it is reasonably probable a result more favorable to Father would have been reached if Father had been presented with the JV-505. (*People v. Watson, supra,* 46 Cal.2d at pp. 836-837.) The point of the JV-505 form is to assist the juvenile court in making a finding related to the alleged father's status. (§ 361.2, subd. (f).) The juvenile court ordered DNA testing on August 20, 2012. The DNA test revealed there was a 99.99 percent probability that Father was J.A.'s biological father. Even with the results reflecting Father was J.A.'s biological father, the juvenile court found J.A. was adoptable and terminated Father's parental rights. It is unclear how presenting Father with a form would have changed this outcome given that Father never met J.A. Thus, we conclude the juvenile court's error was harmless.

Father asserts the error "was not harmless because being provided with the correct form would have enabled [Father] to better articulate his position and his wishes to the court." Father's argument is not persuasive because the JV-505 form concerns efforts an alleged father made to support the child and/or hold the child out as his child. For example, there is a space for an alleged father to explain the time the child has spent with the alleged father's family. Given that Father never met J.A. nor interacted with J.A.'s foster parents, it appears unlikely that Father could have completed the form with meaningful information for the court given the questions on the form. Moreover, Father was present at the hearing on August 20 but never spoke, further indicating a lack of

information to be offered on Father's part. In sum, we find Father's argument to be unpersuasive.

C. DNA TEST RESULTS

Father contends the juvenile court erred by not informing him of the paternity test results in a timely manner. Father asserts there is nothing in the record reflecting he was notified of the paternity results "much before January 27, 2013." In support of this contention, Father cites his January 27 letter to the court wherein he wrote, "A paternity test has now proved that [J.A.] is my son." Father emphasizes the word "now" in the letter as proof that there was a delay in notifying Father of the test results. Father argues the delay was legally significant because it "prevented him from asserting his rights in a timely manner."

As set forth *ante*, due process guarantees notice and a meaningful opportunity to be heard. (*Jesusa V.*, *supra*, 32 Cal.4th at p. 601.) The DNA test results were filed with the court on December 14. There is nothing in the record indicating when exactly the test results were given to Father. Father does not clarify in his briefing when he learned of the test results. Father does not make an offer of proof or other affirmative representation reflecting he did not learn of the test results until it was somehow too late to act on the information. Father relies only on the vague wording in his letter, rather than clearly informing this court about when exactly he learned of the test results.

"In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.]" (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [Fourth Dist., Div. Two].) The information concerning when Father

received the test results is wholly within Father's knowledge. (*Ibid.*) Father waited until this appeal to complain of receiving the test results in an untimely manner; at this point, Father cannot withhold his knowledge about when he learned of the results in order to obtain a reversal. (*Ibid.*) The burden is on Father to show that if the court erred, a miscarriage of justice occurred. (*In re G.C., Jr.* (2013) 216 Cal.App.4th 1391, 1400.) Father has not met this burden.

D. REQUEST FOR AN ATTORNEY

Father contends the juvenile court erred by failing to respond to Father's January 27, 2013, request that the court appoint an attorney for him. Father asserts his request for an attorney reflects (1) he did not know the court had already appointed an attorney for him, or (2) he did not believe his attorney was effective. Father asserts his lack of knowledge or faith in his court appointed attorney was compounded by Father not being transported to the hearing and not being presented with a JV-505 form.

At the hearing on December 18, Father's attorney said Father waived his right to be present at the hearing. In Father's January 27 memo, he confirmed that on November 20 he signed a waiver of his right to be present at the December 18 hearing. The written waiver does not appear in the record. It can be inferred from the waiver information that there was some level of communication between Father and his juvenile court attorney, since the attorney was aware of Father's waiver despite the signed waiver not being in the record. Additionally, at the February 4 hearing, Father's attorney requested Grandmother be assessed for placement of J.A. because "that was [Father's] wish." Father's argument is asking this court to speculate that despite this

evidence of attorney-client communication, (1) Father was unaware he had a court appointed attorney, or (2) he felt his attorney was ineffective. Speculation will not support reversal of a judgment. (*People v. Gray* (2005) 37 Cal.4th 168, 230; *In re Esmeralda S.* (2008) 165 Cal.App.4th 84, 96 [Fourth Dist., Div. Two].) Thus, we find Father's argument to be unpersuasive.

E. CUMULATIVE ERROR

Father asserts the alleged errors detailed *ante*, combined to deny him due process: not being transported to the hearing, not being presented with a JV-505 form, and not being given a response to his request for legal counsel.

As set forth *ante*, due process guarantees notice and a meaningful opportunity to be heard. (*Jesusa V.*, *supra*, 32 Cal.4th at p. 601.) The issue at the termination hearing was whether J.A. was likely to be adopted. (§ 366.26, subd. (c)(1).) Father was represented by counsel at the termination hearing. On behalf of Father, counsel requested Grandmother be assessed for placement of J.A. Father never met J.A. or interacted with J.A.'s foster parents. Thus, it is unclear what, if any, evidence or argument Father could have offered about J.A.'s adoptability. Father's counsel expressed Father's desire for Grandmother to be assessed for placement of J.A. Grandmother offered the court evidence about Father's educational progress. Father does not explain what other information, if any, he would have offered had he been present at the hearing, afforded a different attorney, or presented with a JV-505 form. Since Father has not explained how a more favorable result may have occurred absent

the accumulation of these alleged errors, we conclude the cumulative effect of the alleged errors was harmless. (*Jesusa V.*, *supra,* 32 Cal.4th at p. 625.)

F. ICWA

Father contends the juvenile court erred by not inquiring into Father's possible Native American ancestry. It does not appear the juvenile court inquired into J.A.'s paternal ancestry after the DNA test revealed Father is J.A.'s biological father. Thus, we conclude the trial court erred because it failed to inquire about J.A.'s paternal ancestry. (§ 224.3, subd. (a).) Accordingly, we review the record to determine if the error was harmless.

"[T]here can be no prejudice unless, if [Father] had been asked, [F]ather would have indicated that the child did (or may) have such ancestry." (*Rebecca R.*, *supra,* 143 Cal.App.4th at p. 1431, italics omitted.) "The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis." (*Ibid.*) An appealing parent can meet this burden by making an offer of proof or affirmative representation "that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA." (*Ibid.*)

In Father's opening brief, he writes that neither he "nor his mother would have any way of knowing that *if they were Native American*, they should step forward and say so[.]" (Italics added.) Father does not assert on appeal that he could proffer evidence reflecting a connection to a Native American tribe. Father is only asserting he may or may not claim a connection to a Native American tribe. In its respondent's brief, the Department asserts, "Father has never represented to anyone that he has Indian

ancestry—once again, he is merely trifling with this court[.]" Despite this information about needing to make an affirmative representation, in Father's appellant's reply brief he still fails to make any affirmative representation concerning a possible connection with a Native American tribe. Given that Father has not met his burden, we conclude the juvenile court's error was harmless.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.